SUPREME COURT, U. S.
FILED
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JOHN F. DAVIS, CLERK

Nos. 256 and 301

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1967

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Caddo Parish School Board, et al., Petitioners

v.

United States of America, et al.

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The Board of Education of the City
of Bessemer, et al., Petitioners

v.

United States of America, et al.

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## SUPPLEMENTAL APPENDIX

To Petitions for Writs of Certiorari to the
United States Court of Appeals for the Fifth Circuit

(Consisting of Dissenting Opinion Below of
Circuit Judge Godbold
Filed on June 27, 1967)

REID B. BARNES
WILLIAM G. SOMERVILLE, JR.
MAURICE F. BISHOP
JOHN C. SATTERFIELD
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WILLIAM P, SCHULER
JOHN A. RICHARDSON

Counsel for Petitioners

IN THE

# United States Court of Appeals

FOR THE FIFTH CIRCUIT

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No. 23345

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UNITED STATES OF AMERICA and LINDA STOUT, by her father and next friend, BLEVIN STOUT,

Appellants,

versus

JEFFERSON COUNTY BOARD OF EDUCATION, ET AL.,

Appellees.

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No. 23331

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UNITED STATES OF AMERICA,

Appellant,

versus

THE BOARD OF EDUCATION OF THE CITY OF FAIRFIELD, ET AL.,

Appellees.

**No. 23335**

**UNITED STATES OF AMERICA,**
**Appellant,**

**versus**

**THE BOARD OF EDUCATION OF THE CITY OF BESSEMER, ET AL.,**
**Appellees.**

***Appeals from the United States District Court for the Northern District of Alabama.***

**No. 23274**

**UNITED STATES OF AMERICA,**
**Appellant,**

**versus**

**CADDO PARISH SCHOOL BOARD, ET AL.,**
**Appellees.**

**No. 23365**

**UNITED STATES OF AMERICA,**
**Appellant,**

**versus**

**THE BOSSIER PARISH SCHOOL BOARD, ET AL.,**
**Appellees.**

**No. 23173**

**MARGARET M. JOHNSON, ET AL.,**
**Appellees.**

**versus**

**JACKSON PARISH SCHOOL BOARD, ET AL.,**
**Appellees.**

**No. 23192**

**YVORNIA DECAROL BANKS, ET AL.,**
**Appellants,**

**versus**

**CLAIBORNE PARISH SCHOOL BOARD, ET AL.,**
**Appellants,**

**No. 23253**

**JIMMY ANDREWS, ET AL.,**
**Appellants,**

**versus**

**CITY OF MONROE, LOUISIANA, ET AL.,**
**Appellees.**

***Appeals from the United States District Court for the Western District of Louisiana.***

No. 23116

CLIFFORD EUGENE DAVIS, JR., ET AL.,
Appellants,

versus

EAST BATON ROUGE PARISH SCHOOL BOARD, ET AL.,
Appellees.

*Appeal from the United States District Court for the Eastern District of Louisiana.*

ON PETITIONS FOR REHEARING EN BANC

(June 27, 1967.)

GODBOLD, Circuit Judge, DISSENTING:

I recognize and oppose the inequities of state-enforced and state-encouraged racial discrimination in the operation of public schools. I respect the energy, labor and intellect that judges of this and other courts have given in the past twelve years toward solution of such inequities. I understand, and share, the desire to chart a future course having fewer difficulties and frustrations. Nevertheless, although the decrees appealed from must be reversed, I dissent from the opinion and the decree.

Because this dissent is late-filed and numerous points have been discussed in the other dissenting opinions, I shall limit this opinion to only a few of the grounds on which the majority opinions, in my

view, are both incorrect constitutionally and inappropriate as a matter of judicial administration.

I

In the critical area of student assignment the majority propose an unconstitutional condition on the operation of a valid freedom of choice system, violative of equal protection and of due process. This court has deemed freedom of choice[1] an acceptable method for a school board to use in fulfilling its duties. *Singleton II*, 355 F.2d at 871. HEW recognizes it as a permissible means of desegregation. 1966 Revised Guidelines, Subpart B, 181.11; also Subpart D. A substantial part of the majority opinions and the attached decree are directed at setting out requirements of a free choice plan that is truly free and unfettered. But the majority superimpose upon free choice, even though in all respects fairly and validly set up and administered, a condition subsequent that the statistical results of racial mixing[2] produced by the freely-made choices must be acceptable under standards imposed from outside those making the choice. They do this by establishing as a constitutional requisite that a free choice system must produce a degree of student racial mixing, not yet defined as to limits but nevertheless required.

[1] Throughout this opinion "freedom of choice" and "free choice" refer to a plan validly set up, properly administered, and with choices freely exercised without external pressures, so that the plan itself (as opposed to the statistical results produced by exercised choices) is in all respects constitutionally acceptable.

[2] The term "racial mixing" is used with intent that it be neither laudatory nor denigrating of the process and the individuals involved, but as a simple descriptive phrase that avoids further confusing use of "integration" and "desegregation."

The United States reads the language of the majority in this vital area as mere dictum. In brief on rehearing the government says: "The appellees, in petitioning for rehearing, asserted that the decision of the panel held that the Constitution imposes an absolute duty to achieve a racial mixing of students so as to eliminate a disproportionate concentration of Negroes in certain schools within a system. Once this proposition is asserted, the appellees have no difficulty in disparaging the opinion as being inconsistent with prior holdings of the Fifth Circuit. It is true that the panel indicated its concern that educational opportunities on an equal basis be furnished to all, and the opinion does suggest in a footnote that elimination of the all-Negro school makes this objective easier to obtain. *But the appellees misread the opinion when they claim that this is the holding of the Court.*" I wish that I could read the majority as saying no more than that disproportionate racial concentration of students is evidentiary of whether a freedom of choice system is truly free, or share with confidence the view that the teeth of the original opinion are extracted by paragraph 5 of the en banc opinion. I am not able to do so. If the language of mandatory mixing is indeed a mere aside we shall all await with interest to see whether the courts are the prisoners of their own slogans and the dictum of today is to be asserted as the law of tomorrow.

The majority define "integration" and "desegregation" as conversion of a de jure segregated dual school system to a unitary, nonracial (nondiscrimina-

tory) system—students, faculty, staff, facilities, programs, and activities, this for the objective of offering equal educational opportunities for all.[3] There are two strings to the bow of this definiton. To convert a dual system into a unitary, non-racial system the student body is one of the arms of the system which must be converted. Second, the equal educational opportunity that must be offered is elsewhere in the opinion equated with a racially mixed education.

The majority state firmly that the law does not require racial balance, or a "maximum of racial mixing", nor that each and every child shall attend a racially-balanced school,[4] and that Guidelines are not to be used to establish racial "quotas." Percentage figures in the Guidelines may be rules of thumb as the majority say. It may develop that neither the courts nor the Commissioner of Education will seek to achieve racial balance by the Guidelines or otherwise. But all this is irrelevant to the constitutional issue. Grasping the irrelevancy requires understanding that "racial balance" is a word of art referring to a ratio of Negro and white students in approximately the same proportions as Negro and white population of the community or of the schools. It is proposed that governmental action must produce a degree of racial mixing less than "racial balance" but, by someone's standards, sufficiently mixed to produce "equal educational opportunity," even though free choices by students and their parents have pro-

[3] Footnote 5.
[4] Footnote 5.

duced a contrary or lesser result.[5] Despite disclaimers of specific figures and of racial balance, power to require mixing is reserved within a range, a hazy range to be sure but nevertheless existent.[6] If the Commissioner and the courts constitutionally have no power to require racial mixing superimposed on a valid free choice system, constitutionality is not conferred by the premise that they will not employ the power to the extent of "racial balance" but are free to roam at will in requiring mixing to a lesser extent.[7]

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[5] For example:

p. ....: "As the Constitution dictates, the proof of the pudding is in the eating: the proof of a school board's compliance with constitutional standards is the result—the performance. Has the operation of the promised plan actually eliminated segregated and token-desegrated schools and achieved substantial integration?"

p. ....: "If school officials in any district should find that their district still has segregated faculties and schools or only token integration, their affirmative duty to take corrective action requires them to try an alternative to a freedom of choice plan, such as a geographic attendance plan, a combination of the two, the Princeton plan, or some other acceptable substitute, perhaps aided by an educational park. Freedom of choice is not a key that opens all doors to equal educational opportunities."

En Banc Opinion p. ....: "In fulfilling this [affirmative] duty it is not enough for school authorities to offer Negro children the opportunity to attend previously all-white schools. The necessity of overcoming the effects of the dual school system in this circuit requires integration of faculties, facilities and activities, as well as students."

Other language is somewhat less mandatory in terms, as statements that mixing of students is a high priority goal and that disproportionate concentrations of Negroes cannot be ignored. But when the opinion is carefully read racial mixing is not set out as a desirable objective but as a constitutionally required result.

[6] Perhaps the range is "substantial integration" as used by the Civil Rights Commission. See n. 5 of majority opinion.

[7] Significant testimony from HEW officials was given in *Alabama NAACP State Conference of Branches et al and United States of America v. Lurleen Burns Wallace, Governor, and John*

The theory that under a free choice plan statistical imbalance alone rises to constitutional dimensions was discarded by the Eighth Circuit in *Clark v. Board of Education of Little Rock*, 369 F.2d 661, 666 (8th Cir., 1966).[8] See also *Deal v. Cincinnati Board of Education*, 369 F.2d 55, 62 (6th Cir. 1966):

> "[T]he mere fact of imbalance alone is not a deprivation of equality in the absence of discrimination.

* * *

*W. Gardner, as Secretary of Health, Education and Welfare of the United States, and Harold Howe II as United States Commissioner of Education*, Case No. 2457-N, decided by a three-judge court on May 3, 1967 (Middle District of Alabama).

As I read that testimony HEW considers it unlikely that a fairly operated free choice plan will fail to produce transfers in numbers that it deems sufficient. But that under §181.54 of the 1966 Guidelines the best indicator of whether the plan is working is the extent of transfers from segregated schools. That a low rate of, or lack of, transfers may lead to an administrative examination of operation of the plan, which might result in a determination that the plan is not being properly operated. That §181.11 authorizes the Commissioner to determine the conditions under which a free choice plan is not acceptable.

There is other HEW testimony that if a school system employed a free choice plan, administered in a non-discriminatory manner in every respect, and no Negro chose transfer to a white school and no white student chose transfer to a Negro school, there would be a "technical violation" of the 1966 Guidelines and the system regarded as not in compliance. (Whether this is likely to occur is not the question. We are concerned with the scope of power, not the withholding of exercise of it.)

[8] "Though the Board has a positive duty to initiate a plan of desegregation, the constitutionality of that plan does not necessarily depend upon favorable statistics indicating positive integration of the races. The Constitution prohibits segregation of the races, the operation of a school system with dual attendance zones based upon race, and assignment of students on the basis of race to particular schools. If all of the students are, in fact, given a free and unhindered choice of schools, which is honored by the school board, it cannot be said that the state is segregating the races, operating a school with dual attendance areas or considering race in the assignment of students to their class rooms. We find no unlawful discrimination in the giving of students a

"[B]are statistical imbalance alone is not forbidden.

* * *

"Appellants' right to relief depends on a showing of more than mere statistical imbalance in the Cincinnati schools."

That school desegregation cases are class actions does not add any validity to the idea of a required mixing result.[9] It may be that "[T]he right of the individual *plaintiffs* must yield to the right of Negroes as a class."[10] But the majority do not stop

free choice of schools. The system is not subject to constitutional objections simply because large segments of whites and Negroes choose to continue attending their familiar schools. It is true that statistics on actual integration may tend to prove that an otherwise constitutional system is not being constitutionally operated. However, these statistics certainly do not conclusively prove the unconstitutionality of the system itself."

* * *

"In short, the Constitution does not require a school system to force a mixing of the races in school according to some predetermined mathematical formula. Therefore, the mere presence of statistics indicating absence of total integration does not render an otherwise proper plan unconstitutional."

[9] I do not comment in detail on the majority's proposition that cases having to do with procedures for enforcement of rights and the exhaustion of administrative remedies are now to be treated as substantively creating class rights to constitutional entitlements previously considered to be valued rights of individuals. Instead I deal primarily with the additional question of whether the alleged class right can override or swallow up individual right to equal protection. "It is the individual who is entitled to the equal protection of the laws." *McCabe v. Atchison, etc.*, 235 U.S. 151, 161, 35 S.Ct. 69, 59 L.Ed. 169 (1914).

[10] The class is defined as all Negroes in a school district attending an inherently unequal school. If equal educational opportunity includes the right to a racially-mixed education with mandatory mixing if not otherwise attained, it is not clear why the class stops at district lines. Stopping at the line is a convenient device for administration and for procedural purposes in litigation but wholly irrelevant to the quantum of constitutional entitlements.

there. They create the rule that the freely-exercised choice of *all* individual members of the class must yield to the "right" of the class if exercise of choice has not produced a result agreeable to the standard of a supervising authority (judicial or administrative). But "[t]here is nothing in the Constitution which prevents his [everyone's] voluntary association with others of his race or which would strike down any state law which permits such association. The present suggestion that a Negro's right to be free from discrimination requires that the state deprive him of his volition is incongruous." *Bradley v. School Board of City of Richmond,* 345 F.2d 310, 316 (4th Cir., 1965). See also, *Olson v. Board of Education,* 250 F.Supp. 1000, 1006 (E.D. N.Y.), appeal dismissed as moot, 367 F.2d 565 (2d Cir., 1966): "[N]or did it [*Brown*] decide that there must be coerced integration of the races in order to accomplish educational equality for this also would require an appraisal of the effect upon the hearts and minds of those who were so coerced."

It is asserted that freedom of choice is a privilege or means not itself reaching constitutional dimensions, as though this is an answer to whether once conferred the exercise of it may be aside. The concern is not merely whether individual privilege must give way to an overriding constitutional right, but whether individual privilege conferred upon the beneficiaries of the right as an acceptable means of meeting the constitutional requirement, and validly exercised, must give way. Exercised free choice is a bene-

fit, and student and parents may not be deprived of that benefit on racial grounds.

Once exercised the choice is one of associates. The constitutional depths of freedom to select associates are not yet fully explored.[11] "No one can doubt that freedom of association, as a basic mechanism of the democratic process, must receive constitutional protection, and that limitations on such a fundamental freedom must be brought within the scope of constitutional safeguards." Emerson, Freedom of Association and Freedom of Expression, 74 *Yale L.J.* 1 (1964). Professor Emerson points out that associational rights are not derived solely from the first amendment but are implied in the whole constitutional framework for the protection of individual liberty in a free society. The right of freedom of association most frequently comes up in the context of the power of government to regulate the affairs of a group or association, *NAACP ex rel Alabama v. Patterson,* 357 U.S. 449, .... S.Ct. ...., .... L.Ed. .... (1958), but arises also in other contexts, includ-

[11] See Wechsler, *Toward Neutral Principles of Constitutional Law,* 73 *Har. L. Rev.* 1, 33 (1959), referred to by the majority. "For me, assuming equal facilities, the question posed by state-enforced segregation is not one of discrimination at all. Its human and constitutional dimensions lie entirely elsewhere, in the denial by the state of freedom to associate . . . ."

And at 73 *Har. L. Rev.* 34: "[I]f the freedom of association is denied by segregation, integration forces an association upon those for whom it is unpleasant or repugnant. Is this not the heart of the issue involved, a conflict in human claims of high dimensions . . . . Given a situation where the state must practically choose between denying the association to those individuals who wish it or imposing it on those who would avoid it, is there a basis in neutral principles for holding that the Constitution demands that the claims for association should prevail?"

ing the area where the associational rights are not organizational but personal in nature. It is this context which *Wechsler, supra,* believed was the primary, but overlooked, issue in the early school segregation cases. And Professor Emerson notes, "[I]n this situation—an official proscription of personal association—the right to associate in its literal meaning comes nearest to being an absolute right untouchable by government power."

The collision is head-on between individual freedom and paternalistic authoritarianism. No more invidious discrimination, or improper government objective, can be imagined than national power setting aside the valid exercise of choice by members of a class in the name of the constitutional objeotive for which the choice was granted to the class in the first place.

The cut horizontally and vertically into American life of what the majority postulate is breathtaking. There are many means by which the Negro is moving out of established patterns of segregation and entering the full current of American life. To meet the constitutional objective of juries not racially discriminatory acceptable machinery must be established to place on the jury rolls Negroes qualified for jury service. *Brooks v. Beto,* 366 F.2d 1 (5th Cir., 1966). In the name of the standard are Negroes (and whites too) constitutionally forbidden to exercise excuses or avail themselves of other means valid and accepta-

ble to them of avoiding actual service?[11a] Whether Negroes are entitled to move, and wish to move, from the back of the bus is one thing; whether the power of the state is to be employed to require them to move is another. We need not speculate on the mathematical probabilities of what the exercise of choices may produce in any of these areas of life (though there is implicit in the majority position the feeling that under a valid free choice system not enough Negroes will make the choice to produce the defined goal of equal educational opportunity.) The constitutional problem is not founded in probability but power and duty of governmental authority to act regardless of probability.[12]

[11a] In a criminal case against a Negro defendant the exercise by the white prosecutor of peremptory challenges so as to strike Negro jurors is not in a particular case a violation of equal protection. *Swain v. Alabama,* 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed. 2d (1965). If the Negro defendant, by like exercise, removes Negro jurors is his action subject to scrutiny?

[12] Nor would the basic constitutional defect be remedied by an approach along the following line: that choice is exercised annually, and if required standards of mixing are not attained in one year the free choice plan itself might be declared unacceptable for the next year. To deprive of free choice because, on the basis of prior choices, it is feared that a required level of mixing will not be attained in the next year is no less invidious than retrospectively vitiating exercise of choice that did not produce the demanded ratio.

Let it be emphasized that here, as elsewhere, the words "ratio" and "required racial mixture" and words of like import do not necessarily represent a figure exact in a mathematical sense, but the range—whatever it may be—less than the "racial balance" which the majority and HEW say they will not attempt to reach but insufficient to qualify as "equal educational opportunity." It requires no special gift of prophecy to foresee that the range will center on the suggested percentages of the Guidelines.

II

Expressions by this court of the validity and constitutionality of the 1966 Guidelines were wholly inappropriate. Because of the context and manner of that action no one can say with assurance or exactness what has been decided, what is open, and what is subject to re-examination.

Each of the seven cases before us was pending on the docket of this Court before the 1966 Guidelines were promulgated. These Guidelines were not involved in any manner in the cases when litigated in the district courts, and the parties had no opportunity to raise by normal judicial procedures and methods questions of their constitutionality and their consistency with the 1964 Act, to draw the issues and develop evidence thereon.

The Guidelines were brought into these cases for a limited purpose. The Court asked counsel to comment by supplemental briefs on the extent to which it is permissible and desirable for the courts to give weight to guidelines, and if permissible and desirable to suggest means to make them judicially effective (Opinion, Footnote 13). From this proper inquiry for comment of counsel on matters of judicial power and policy the majority have vaulted to premature pronouncements of compliance with statutory policy and to unprecedented and almost offhand statements on complex constitutional questions of vital significance to millions of our citizens.

It is a non sequitur that a court is empowered to act on a constitutional question not before it for decision on the ground it feels it should, for no court would ever do so without such feeling. The doctrine of constitutional restraint is not to restrain courts that do not want to act but those that do and to protect them from the very forces and circumstances that engender a sense of urgency, create a compulsion to act and serve to rationalize action after the event.

For reasons whose soundness is beyond argument the doctrine of restraint in passing on constitutional issues is engrained in our jurisprudence. "Grave constitutional questions are matters properly to be decided by this Court but only when they inescapably come before us for adjudication . . . . only by such self-restraint will we avoid the mischief which has followed occasional departures from the principles which we have followed." *United States v. Rumely*, 345 U.S. 41, 48, 73 S.Ct. 543, 97 L.Ed. 770, 776-77 (1953).[18] This circuit consistently has recognized and honored the principle. See e.g., *Gibbs v. Blackwell*,

[18] "[O]nly an adjudication on the merits can provide the concrete factual setting that sharpens the deliberative process especially demanded for constitutional decision." *United States v. Auto Workers*, 352 U.S. 567, 591, .... S.Ct. ...., .... L.Ed. .... (1957).

"We have consistently refrained from passing on the constitutionality of a statute until a case involving it has reached a stage where the decision of a precise constitutional issue is a necessity . . . . . Many questions of a statute's constitutionality as applied can best await the refinement of the issues by pleading, construction of the challenged statute and pleadings, and, sometimes, proof." *United States v. Petrillo*, 332 U.S. 1, 5 and 6, .... S.Ct. ...., .... L.Ed. .... (1947).

354 F.2d 469, 471 (5th Cir., 1965); *Conner v. New York Times Co.*, 310 F.2d 133, 135 (5th Cir., 1962).

The Court succumbed to the temptation to reach all issues within its sight and thereby present a total package—complete, neat and with all corners square. Already it was well-established that the Guidelines are of great weight and are minimum standards. If they were to be made judicial standards in a more formal sense they could have become so subject to a determination of their constitutionality and statutory authorization at a proper time and under appropriate judicial procedures.[14] The millions affected by them are entitled to no lesss, nor are the public officials who must administer them, the school officials who must seek to implement them, the citizens who are assisted by them, and the courts who are to give weight to them.

The position of the United States itself exemplified that validity and constitutionality of the Guidelines were never in issue. At p. 56 of its brief for the en banc rehearing the United States said:

> "The appellees' briefs argue at considerable length that the Guidelines violate the Civil Rights Act of 1964. The North Carolina Board of Education, as *amicus curiae*, requests that the Court not consider the ques-

[14] There is no way for a court to properly decide as an abstraction whether the Guidelines are such rules, regulations or orders as do not become effective until approved by the President (as required by §602, Title IV, Civil Rights Act of 1964, 42 U.S.C.A. §2000 d-1). There must be a hearing at which there is evidence on the scope of their application.

tion of the 'validity' of the Guidelines, urging that that question is not here in issue. We agree that that issue is not technically before the Court. But the question of whether the Guidelines are an appropriate guide for effective relief in a Fourteenth Amendment case is before the Court. We believe that they are, and that the Guidelines conform to Fourteenth Amendment standards."

It is especially unfortunate that the en banc court should have discussed validity and constitutionality at a time when there was pending before a three-judge court in the United States District Court for the Middle District of Alabama, *Alabama NAACP State Conference of Branches, et al, and United States of America v. Lurleen Burns Wallace as Governor, et al, and John W. Gardner, as Secretary of Health, Education and Welfare of the United States, and Harold Howe II, as United States Commissioner of Education,* Civil Action No. 2457-N, which had been tried, briefed, argued and was under submission awaiting decision.

In that case the constitutionality of the 1966 Guidelines had been squarely raised, a record developed,[15] and the application, effect, operation and validity of the 1966 Guidelines litigated at length, including the difficult question of presidential approval.

[15] The parties called 16 witnesses, submitted 40 depositions and filed approximately 800 pages of briefs. A substantial part of all this related to constitutionality of the Guidelines and whether they conformed to the intent of the 1964 Act.

The United States had waived sovereign immunity to the extent of consenting that Secretary of Health, Education and Welfare Gardner and Commissioner Howe be made parties defendant for the purpose of litigating these important questions. Secretary Gardner and Commissioner Howe appeared and admitted jurisdiction.

The mischief of failure to exercise requisite judicial restraint was exemplified when 2457-N was decided on May 3, 1967, for that court considered constitutionality and validity to be already decided by this Court and a decision based on appropriate pleadings, proof and consideration was foreclosed.[16]

[16] "After extensive briefing and full argument, the Court of Appeals for the Fifth Circuit in No. 23,345, *United States v. Jefferson County Board of Education,* decided December 29, 1966, rehearing decided en banc March 29, 1967, has held that the 1966 HEW Guidelines are 'within the scope of the congressional and executive policies embodied in the Civil Rights Act of 1964.' (Slip opinion p. 29.) Again the Court said: '* * * we hold that HEW's standards are substantially the same as this Court's standards. They are required by the Constitution and, as we construe them, are within the scope of the Civil Rights Act of 1964.' (Slip opinion p. 9.) On en banc rehearing, the Court reiterated: 'These Guidelines and our decree are within the decisions of this Court, comply with the letter and spirit of the Civil Rights Act of 1964, and meet the requirements of the United States Constitution.' (Slip opinion p. 7.)

"These holdings were made deliberately and advisedly in the face of contentions that the validity of the 1966 Guidelines was not in issue. The Court ruled otherwise, holding that the courts should rely heavily upon the Guidelines and should model their standards after those promulgated by the executive (original slip opinion p. 18), and that 'these Guidelines establish minimum standards clearly applicable to disestablishing state-sanctioned segregation.' (Slip opinion on en banc rehearing p. 7.)"

In my view the expressions by this Court on both constitutionality and validity were substantively erroneous. But that is immaterial to the matter of how vital questions are properly considered and determined.

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